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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-595

JERRY HOWARD SIMPKINS and
JESSE HOWARD SIMPKINS,
Petitioners

v

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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BRIEF AND APPENDIX OF PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1974

RECORD NO.

JERRY HOWARD SIMPKINS and
JESSE HOWARD SIMPKINS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on October 18, 1974.

CITATION TO OPINION BELOW

A jury, sitting in the Eastern District of Virginia, Norfolk Division, returned verdicts of guilty against the Petitioners herein on May 30, 1973. On November 6, 1973, the Honorable Richard B. Kellam, Judge of the Eastern District of Virginia, denied without opinion defense motions to set aside the verdict and either dismiss the indictments or grant the petitioners herein new trials. Judgments thereon were entered November 7 and 8, 1973. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is not yet reported. The opinion of the Fourth Circuit, dated October 18, 1974, is printed in Appendix A hereto, infra, p.1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The questions presented for decision are:

1. Did the denial of a speedy trial entitle the petitioners to have the indictments against them dismissed?

2. Did the prejudicial comments of the trial judge deprive the petitioners of their right to a fair trial?

3. Was cross-examination of the prosecution's chief witness unfairly limited by the trial judge?

STATUTORY PROVISIONS INVOLVED

Petitioners rely upon the speedy trial guarantee of the Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .

The indictments returned against the petitioners alleged violations of 18 U.S.C. §§ 2312 and 2314. Said sections read:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. 18 U.S.C. § 2312.

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities, or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud. . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
> 18 U.S.C. § 2314.

STATEMENT OF THE CASE

The United States of America, respondent herein, instituted these proceedings against the petitioners upon Indictment No. 213-71-N, returned November 8, 1971, charging violations of 18 U.S.C. §§ 2312 and 2314. The indictment named three defendants, the petitioners and Jack Allen Booher. Four violations of 18 U.S.C. § 2312 and four violations of 18 U.S.C. § 2314 were alleged in the indictment. Allegedly involved was the unlawful transportation in interstate commerce of certain automobiles and heavy machinery with knowledge that each item was stolen.

Trial of Indictment No. 213-71-N was scheduled for March 9, 1972. A continuance was granted defense counsel because of illness. A new trial date, March 13, 1972, was assigned. Prior to

March thirteenth, the prosecuting attorney called defense counsel and requested his agreement to a continuance for the purpose of obtaining immunity for the prosecution's chief witness, Ellen O'Meara. Defense counsel consented to the continuance with the provision that the case be reset and tried within forty-five days. Shortly after this agreed continuance, Mr. John A. Field, III, the Assistant United States Attorney involved, was appointed United States Attorney for the Southern District of West Virginia, and the case was turned over to Assistant United States Attorney, Mr. Roger T. Williams.

Indictment 213-71-N was dismissed against the co-defendant, Jack Allen Booher, in the spring of 1972. Upon learning of this, defense counsel wrote to Mr. Williams on June 15, 1972, and August 28, 1972, requesting that the indictment against the petitioners be dismissed on the grounds that justice should be uniformly applied. Furthermore, between August 28, 1972 and February, 1973, defense counsel spoke to Mr. Williams, demanding the cases be set for trial or dismissed, to which request Mr. Williams stated that he was awaiting direction from his superiors.

Immunity was obtained for Ellen O'Meara and she appeared before a grand jury on March 13, 1973. The grand jury returned a new indictment against the petitioners. This indictment, Cr. No. 69-73-N, was identical in number of

counts (eight) and substance as the indictment of November 8, 1971, No. 213-71-N, with the exception that Jack Allen Booher was not included as a defendant.

Defense counsel then moved to dismiss with prejudice Indictments No. 213-71-N and 69-73-N on the grounds that petitioners had been denied their right to a speedy trial. At a hearing on April 2, 1973, the Honorable Walter E. Hoffman, District Judge, dismissed Indictment No. 213-71-N and set a hearing on the defense motions for April 17, 1973. At the later hearing, Mr. Hunter Sims, the Assistant United States Attorney now handling the case, delivered a "Superseding Indictment", Cr. No. 91-73-N, to defense counsel. This indictment substituted for Count I of 69-73-N and merely changed the allegedly violated section from 18 U.S.C. § 2314 to 18 U.S.C. § 2312. On April 17, 1973, the Court made the substitution and overruled the defense motions to dismiss the indictments for want of a speedy trial.

The petitioners were tried and found guilty by a jury on May 30, 1973.

On April 17, 1973, evidence was adduced from the petitioners in support of their motion to dismiss the indictments against them due to the deprivation of their speedy trial right. The testimony showed that Mr. Howard Strickland would have been called as a witness at the trial,

rescheduled for March 13, 1972; that his testimony would have been that all his business dealings with the petitioners were legitimate; but that he died in April 1972, during the government's continuance. Also, the testimony at the April 17, 1973 hearing showed that Lottie Gertrude Simpkins, mother of Jesse Howard Simpkins, would have been called as a witness at the March 13, 1972 trial; that she had had a telephone conversation with Ellen O'Meara in August 1970 while she was serving as office manager of the petitioners' business; that said conversation tended to exonerate the petitioners of any knowledge that the items in question were stolen; and that she died on January 1, 1973.

Without the witness Ellen O'Meara, the petitioners would not have been convicted. This witness claimed to be one of thirty people in an organized crime ring operating out of New York which stole the items in question. She stated she was a convicted felon, admitted she was granted government immunity from prosecution and admitted she was involved in all types of underworld and illegitimate activities for many years.

O'Meara was asked by defense counsel to state the names of the members of the crime ring to test her veracity. The witness refused to answer. The Court, upon request of the government, upheld her refusal to answer. This witness

made the statement that the petitioners knew with whom they were dealing.

In preliminary remarks to the jury, the Court commented that any action of counsel in raising objections should not be interpreted as impropriety on their part and that such counsel have a tremendous duty in a criminal case. During the third day of trial, in the presence of the jury, the trial judge, in a loud, strident voice, yelled at the defense counsel that he was not conducting himself properly. An immediate motion for mistrial was denied. Defense counsel then requested the Court to instruct the jury that no inference of misconduct on the part of defense counsel should be drawn from the remarks of the Court. The Court refused.

REASONS FOR GRANTING THE WRIT

A. The Petitioners were denied their fundamental right to a speedy trial. The underlying basis and the fairness inherent in this right is illustrated by the facts of this case.

An eighteen month delay by the prosecution saw the death of two witnesses material to the defense. The delay was against the wishes of defense counsel, who repeatedly pressed for a trial.

The constitutional test of the denial of this right is the interrelationship of

four factors: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

An eighteen month delay has been held presumptively prejudicial. Delph v. Slayton, 355 F.Supp. 888 (W.D.Va. 1973)—seventeen month delay; United States v. De Tienne, 468 F.2d 151 (7th Cir. 1972)—nineteen month delay. There was no consideration of this factor by either the trial or appellate courts in this case.

The government has offered no justification for the delay, which elicited the comment from the district judge who heard the motion to dismiss on April 17, 1973, that this case was ". . .not the finest example of efficiency in getting a case around to trial. . ." A twelve month delay in bringing the witness Ellen O'Meara before a grand jury is inexcusable and should be weighed against the loss of two material witnesses for the petitioners.

Petitioners challenge the bare assertion of the appellate court below that ". . .the defendants had not asserted their right to a speedy trial until the April 2, 1973 hearing." Defense counsel had made demands to the United States Attorney, on at least six occasions, that the cases be set for trial or else dismiss the indictments. When the United States Attorney failed to take action, defense

counsel scheduled a hearing before the district court at the earliest opportunity. The reasoning of the appellate court would place on the accused the burden of seeking a speedy trial. This is the burden of the prosecution. "(S)ociety has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." Barker v. Wingo, 407 U.S. at 527.

The petitioners were prejudiced. "If witnesses die or disappear during a delay, the prejudice is obvious." Barker v. Wingo, 407 U.S. at 532. These petitioners lost two material witnesses during the government's delay.

The appellate court chose to ignore uncontradicted evidence that petitioners had asserted their right to a speedy trial. The actions of the petitioners were logical and reasonable when they made demands on the United States Attorney to set the case for trial or to dismiss the action. Certainly, the prosecution was not surprised when the petitioners sought the protection of the court in the face of their repeated demands to the United States Attorney. It is important to the uniform application of justice that this Court hold the prosecution accountable for its failure to bring this case to a speedy trial.

B. The petitioners were denied a fair trial by the prejudicial comments of the trial judge.

The trial judge should direct and control the proceedings and in the federal court has a right to comment on the evidence, but ". . .he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror. . ." Sunderland v. United States, 19 F.2d 202, 216 (8th Cir. 1927). In this case he became both. In the presence of the jury throughout the trial, defense counsel was chastized by the trial judge, who also made comments to the jury reflecting on the conduct of defense counsel, and, at one point, intimated that defense counsel was acting improperly. This bias of the trial judge was reinforced by his assuming the role of prosecutor by interposing objections to questions by trial counsel.

The trial judge is cloaked with more than judicial authority. The jury hangs on every word and gesture and constantly seeks some indication of the judge's judgment of the issue. United States v. Ah Kee Eng, 241 F.2d 157, 161, 62 A.L.R. 2d 159 (2d Cir. 1957). Measure this power against an outburst by the judge shouting in anger at defense counsel and refusing to soften the effect, upon request, and one is not surprised by the verdict of guilty. This is true even though the evidence against petitioners is not overwhelming, with the case

resting primarily on the testimony of one prosecution witness whose credibility is suspect.

This excessive abuse of the administration of justice should not be tolerated by this Court.

C. Cross-examination of the prosecution's chief witness was improperly limited by the trial judge.

The key witness for the United States was Ellen O'Meara. She testified that the petitioners knew the thirty members of the "ring" who were stealing the vehicles, knew the kind of people they were dealing with, and knew that if they did not pay they were in trouble.

This was a final answer to the only question in the case: Did the petitioners have knowledge that the vehicles were stolen. The only possible attack on this testimony was to obtain the names of the members of the ring and tender proof that the petitioners did not know the members and the members did not know the petitioners.

The appellate court suggests that since the petitioners did not subpoena the other three members of the so-called ring that there was no merit to this issue. Petitioners admitted that they knew O'Meara and the three other people handling the vehicles. Thus, there was no reason to call such witnesses. The

other twenty-six members, however, were critical to the defense. The number involved alone would suggest that this was an established criminal ring known to everyone, including the petitioners. The trial court left this proof in the minds of the jury and denied petitioners the right to test it.

If tested, this line of questioning might also have revealed answers which would discredit the witness and test her veracity.

CONCLUSION

Petitioners contend that the District Court, whose decision was affirmed by the Court of Appeals, has decided this case contrary to applicable decisions of this Court; and has decided an important question of federal law which has not been, but should be, settled by this Court; and has so far departed from the accepted and usual course of judicial procedure, as to call for an exercise of this Court's power of supervision. For these reasons, and for the further reason that this Court should always correct error where indicated, it is respectfully requested that certiorari be granted so that said error may be corrected.

Respectfully submitted,
JERRY HOWARD SIMPKINS
JESSE HOWARD SIMPKINS

By:
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for Writ of Certiorari were mailed to the Solicitor General of the United States, The Honorable Robert H. Bork, Department of Justice, Washington, D. C. 20530, pursuant to the provisions of Rule 33 of the Revised Rules of the Supreme Court of the United States, before the date of the filing hereof.

_____

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